

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 121 with 122 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA

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ROHIT JAYANTILAL JAIN

Versus

STATE OF GUJARAT

Appearance:

MR DD VYAS for Petitioners

Mr.P.G.Desai, ld.PP for the State

CORAM : MR.JUSTICE N.J.PANDYA

Date of decision: 24/09/97

ORAL JUDGEMENT

There is clearly an error in exercise of jurisdiction by the learned Sessions Judge of Bulsar at Navsari while dealing with Criminal Revision Application No.22 of 1987 and 23 of 1987. The question involved in the both the matters is common. The accused-petitioners are facing two criminal cases No.4/84 and 5/84 in the Court of Additional Chief Judicial Magistrate of Bulsar. In these two cases, they are facing trial under Sections 465, 468, 417, 477-A and 420 of Indian Penal Code. The amount involved in the two cases might be different. However, the common point involved is that of the 3 accused, one other than the petitioners opted out to be an approver and therefore, he sought pardon and wanted to be treated as an accomplice. This attracted the provisions of Sec.306 of Cr.P.C. Sub-Sec.4 thereof requires that the person who is accepting the tender of pardon as per sub-sec.(1) shall be examined as a witness. Once a person is being examined as a witness, by a Court or a Magistrate as the case may be, the person likely to be adversely affected by the testimony thus brought on record shall, under the present disbursement of justice,

be entitled to cross examine the person so examined as a witness. This is a general rule applicable to all the witnesses and once the word "wintess" is used in relation to a person, who was till tender of pardon, an accused, would also fall into that category because the prosecution will certainly rely upon his testimony. Reliance is for the purpose of proving the case against the accused. The lease, therefore, that could be done is to allow the cross-examination. That is exactly what the learned Addl.Chief Metropolitan Magistrate, Bulsar did, by his order dated 27-4-1987.

2. The learned PP had raised no objection. However, inspite of this position of record, the State decided to carry the matter in revision before the learned Sessions Judge, Bulsar at Navsari and that is how, 2 Revision Applications No.22 & 23 both of 1987 came to be filed.

3. The learned Sessions Judge allowed the Revision and set aside the order of the learned Chief Judicial Magistrate. The reason given by him is to be found in para 17. He refers to the committal proceeding and therefore, feels that no accused can be given two opportunities and committal proceedings being in the nature of an inquiry, there is no question of accused being permitted to cross examine the witness. However, as could be seen, in the opening part of the judgment of the learned Sessions Judge itself, original accused no.3 requested for being pardoned during the trial. Otherwise also, the case is not triable by the Court of Sessions and hence, there is no question of initiation of committal proceedings. Thus, the very foundation of the order of the learned Sessions Judge of there being a committal proceedings is knocked out.

4. Before the trial Court as well as the Sessions Court, a Full Bench decision of this Court reported in 3 GLR 564 was sought to be relied upon. The citation before the two Courts below was with reference to AIR reporting. The case is teh same. The principal question involved in the said Full Bench decision was whether a sub-Divisional Magistrate is competent to tender pardon or not. Answering the question in the affirmative, it has been observed that the procedure of examining the person so pardoned shall have to be followed and if it is not done, it deprives the accused of an important right causing prejudice to him and it would result in failure of justice. The important right of the accused is not merely to know what the witness says in his deposition but the right can effectively be exercised only if the

witness, who thus deposed is allowed to be cross examined on behalf of the accused. But for the right of the cross examination, it remains merely a formal opportunity of allowing the accused to know what the witness has said. In other words, not allowing the cross-examination takes away the important right of a person defending the charge in criminal trial as it could be disproved only by effectively improving the tool of cross examination. It is therefore, quite clear that the learned Sessions Judge has committed error in exercise of his jurisdiction.

3. In the result, the Revision Applications are allowed. The order of the learned Sessions Judge is set aside and the order of the learned Chief Judicial Magistrate, Bulsar at Navsari is confirmed. Rule is made absolute accordingly.
